IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

Nos. 18 and 36

CITY OF DETROIT, A MICHIGAN MUNICIPAL CORPORATION, AND COUNTY OF WAYNE, A MICHIGAN CONSTITUTIONAL BODY CORPORATE, *Appellants,*

vs.

THE MURRAY CORPORATION OF AMERICA, A DELAWARE CORPORATION, APPELLEE, AND THE UNITED STATES OF AMERICA, *Intervenor*

ON APPEAL FROM, AND WRIT OF CERTIORARI TO, THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF AMICI CURIAE OF THE MEMBER MUNICIPALITIES OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS.

ROGER ARNEBERGH,
City Attorney,
Los Angeles, California.

PETER CAMPBELL BROWN,
Corporation Counsel,
New York, New York.

E. R. CHRISTENSEN,
City Attorney,
Salt Lake City, Utah.

J. ELLIOTT DRINARD,
City Attorney,
Richmond, Virginia.

MARSHALL F. HURLEY,
City Attorney,
St. Paul, Minnesota.

J. FRANK MCKENNA,
City Solicitor,
Pittsburgh, Pennsylvania.

JOHN C. MELANIPHY,
Corporation Counsel,
Chicago, Illinois.

CHARLES S. RHYNE,
S. WHITE RHYNE, JR.,
400 Hill Bldg., Wash., D. C.

INDEX

Authorities Cited

Decisions

LEGAL PUBLICATIONS

MISCELLANEOUS

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

Nos. 18 and 36

CITY OF DETROIT, A MICHIGAN MUNICIPAL CORPORATION, AND COUNTY OF WAYNE, A MICHIGAN CONSTITUTIONAL BODY CORPORATE, *Appellants,*

vs.

THE MURRAY CORPORATION OF AMERICA, A DELAWARE CORPORATION, APPELLEE, AND THE UNITED STATES OF AMERICA, *Intervenor*

ON APPEAL FROM, AND WRIT OF CERTIORARI TO, THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF AMICI CURIAE OF THE MEMBER MUNICIPALITIES OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS.

INTEREST OF AMICI CURIAE

The National Institute of Municipal Law Officers (NIMLO) is an organization of more than one thousand municipalities located in each of the 48 states, the District of Columbia, and in the territories of Alaska, Hawaii and Puerto Rico. Each member city acts through its chief legal officer, known variously as Corporation Counsel, City Attorney, City Solicitor, Director of Law, etc.

This brief is filed under Rule 42(4) of this Court. The members of NIMLO are political subdivisions of states and this Brief is sponsored by their authorized law officers.

The issue at stake in the instant case is of vital interest not only to the City of Detroit and Wayne County, but to many other municipalities which depend for financial support either wholly or partially on ad valorem property taxes.[1]

The nation-wide value of materials in the hands of Federal contractors, paper title to which has been transferred to the Federal government by partial payment-title transfer contract clauses, has been estimated by a government spokesman at more than $4 billion dollars.[2] The same spokesman concluded that this represented annual revenue of over $40 million dollars to local taxing authorities if not immune from their personal property taxes.[3]

The members of NIMLO have been active for many years, through their standing committee on Municipal Revenues from Federally-Owned Property, in seeking to correct the injustices and financial hardships which often arise from

---

[1] Approximately 75% of local tax revenues are derived from property taxes. *Report of Committee on Taxation and Revenues*, 20 MUN. L. REV. 100, 102 (NIMLO 1957).

[2] Statement of I. M. Labovitz, Assistant to Division Chief, Labor and Welfare Division, Bureau of the Budget, Hearings Before the Subcommittee on Legislative Program of the Committee on Government Operations, U. S. Senate, 83d Cong., 2d Sess., on S. 2473, pp. 50, 51 (1954). The Budget Bureau's estimate was as of June 30, 1953. The amount has undoubtedly increased a great deal since then.

[3] It is difficult to make such an estimate, since variance in assessment practices and ratios of assessed to full market values as well as tax rates materially enter into determination of such a figure. The Bureau of the Budget used an average rate of one percent as a "rough-and-ready basis." This rate was criticized as too low by Wilber M. Brucker, then General Counsel for the Department of Defense, in testimony before the same committee the following day. Mr. Brucker suggested a "conservative" average of two percent, based on pending cases including the instant case in which the rate was approximately three percent. *Id.* at 109-11.

the rule of implied constitutional immunity of Federal property from local taxation.[4]

SUMMARY OF ARGUMENT

The rule of Federal immunity from local taxation, first enunciated by the Supreme Court in 1819, was intended to protect the people of the United States from unbridled discriminatory taxation by the local governments of any part of the United States. It was needed because the powerful states could easily tax the Federal government to destruction in the absence of any safeguard.

The Supreme Court has recognized that the rule is not absolute and there are instances in which it does not apply. In this case, the Court is asked to decide whether or not the rule should be applied to an instance in which a private corporation seeks to gain tax immunity by the transfer of paper title to part of its assets to the Federal government while retaining all the incidents of ownership. In deciding whether or not immunity should be thus extended, the Court should bear in mind that: (1) the tremendous growth of the Federal government has imposed severe financial hardship on local governments; (2) a safeguard against unbridled taxation is provided by the fact that the tax is nondiscriminatory and must also be paid by the voters who elect those who enact it; and (3) local governments provide municipal services to the Federal government and its contractors, which must be paid for.

---

[4] See the reports of this committee in the Institute's annual publication, NIMLO MUNICIPAL LAW REVIEW (called MUNICIPALITIES AND THE LAW IN ACTION before 1953); see also Report of Committee on Federal-City Relations, 21 MUN. L. REV.—(NIMLO 1958). The National Conference of NIMLO, held Oct. 6-10, 1957, passed a Resolution Against Drawing of Defense Contracts To Prevent Local Taxation.

ARGUMENT

I. Local Governments Are Faced With a Serious Financial Problem Because of the Restriction Placed on Their Ability to Raise Revenue by the Implied Doctrine of Federal Tax Immunity.

In recent years, municipal expenses have increased to an all-time high. Cities have felt the impact of the rising cost of living. The cost of needed supplies and building materials has increased, and monthly wages and salary payments by cities have more than doubled since 1947.[5] In the face of all this, the public has demanded more and more municipal services, and the states have demanded higher standards for those services already performed.

To meet these increased expenses, the cities have been compelled to seek additional revenues. But they have found it difficult to do this, primarily for two reasons: First, the ever increasing burden of Federal taxation has made the average voter loath to support additional local taxes.[6] Second, the increasing property ownership of the Federal government has made more and more property immune from local taxation. The result is that the plight of many municipalities is extreme.[7]

---

[5] *Report of Committee on Taxation and Revenues*, 21 MUN. L. REV. (NIMLO 1958).

[6] In the twenty year period from 1932 to 1952, the percentage of total taxes collected by local governments fell from 56 percent to 12 percent. During the same period, the percentage of total taxes collected by the Federal government rose from 22 percent to 75 percent. Wetherby, *Fiscal Crisis in the States*, NATIONAL TAX ASSOCIATION, PROCEEDINGS OF THE FORTY-SIXTH ANNUAL CONFERENCE 291 (Welch ed. 1954).

[7] See Miller, *State Taxation of Federal Contractors*, 4 J. PUB. L. 299, 302 (1955). In both 1955 and 1956, American cities expended roughly $2 billion more than they received in form of revenue. The 1956 debt level for local governments represented a record end-of-year high—an increase of approximately ten percent. Report released by United States Department of Commerce, Bureau of the Census, on August 23, 1957, pp. 1, 2, 14.

One quarter of the total land area in the continental United States is owned by the Federal government, and hence tax exempt.[8] With atomic research and defense production activities added to the ordinary governmental functions, the value of personal property owned by the Federal government has likewise increased to immense proportions. The impairment to local revenues, which still derive mainly from ad valorem property taxes, is patent.

But a mere recital of total property owned by the Federal government gives no indication of the full impact on individual communities. The hardship to municipalities is compounded by the fact that this property is unevenly distributed throughout the nation. For instance, eleven states have within their boundaries 4/5 of all the Federally owned land, and each of five states have less than one percent.[9] Federal industrial plants, with their valuable machinery, equipment and inventories of goods, are scattered unevenly among communities, and frequently bring financial crisis to municipal governments where they locate. When tax immune industries come in, Chambers of Commerce may exult but practical city tax officials shudder. School systems and municipal welfare organizations soon become overburdened; street maintenance costs go up, and utility services, fire and police protection have to be increased.[10]

---

[8] Study Committee Report, submitted to the Committee on Intergovernmental Relations, U. S. Senate, printed in *Hearings Before the Committee on Government Operations*, 84th Cong., 1st Sess., on S. 826, p. 164 (1955).

[9] *Id.* at 165. "The latest inventory of Federal holdings in California shows that Uncle Sam owns 46.7 per cent of the land, valued by the *original* acquisition cost at $291 million. Furthermore, Uncle Sam owns 49,115 buildings in the state with a value of over $1½ billion." American Municipal News, Sept. 16, 1957.

[10] *E.g.*, see the experience of one Connecticut city with an aircraft plant, as recorded in The Study Committee Report, *supra* note 8, at p. 219. See also Chatters, *The Effect of the Defense Program on Municipal Government*, National Tax Association, Proceedings of Forty-Fifth Annual Conference 167 (1953).

Where existing manufacturing properties are transferred to defense production, the same services must be rendered by the municipal government as before, but the tax base is decreased.

Tax immune industrial operations, and the threat thereof, also make economical long term municipal borrowing for schools and capital improvements impossible. Investors are reluctant to purchase municipal bonds, or insist upon high rates of interest because of the unpredictable tax base.

Federal payments to localities in lieu of taxes, to relieve cases of particular hardship, are an unsatisfactory solution to a recognized inequity. Aside from requiring costly Federal administrative machinery where local tax machinery is already set up to do the job, they establish the undesirable possibility of Federal coercion of the localities.[11]

The present concern of local governments is with the so-called partial payment clauses in agreements executed between the Federal government and local manufacturers, by which the already heavy oppression of Federal immunity is sought to be extended by contract to further decrease the tax base. Property worth billions of dollars is covered by this type of contract alone.[12] Such loss is particularly serious since it often comes without any advance warning, so that there is not even opportunity for adjustment in preparation of local budgets. The mere decision of contract procurement officers to permit such clauses to be included in government contracts whenever and wherever they deem it advisable is all that is needed, if Appellee prevails here, to render immune otherwise assessable personalty.

---

[11] "The power to confer or withhold unlimited benefits is the power to coerce or destroy." Mr. Justice Roberts in Butler v. United States, 297 U.S. 1, 71 (1936).

[12] Text, *supra* at note 2.

II. The History of the Doctrine of Federal Immunity Shows That It Should Be Applied Only Where Needed as Security Against Unbridled Taxation Without Representation. That Reason Does Not Apply in the Instant Case.

The immunity of the Federal government from state and local taxation was first enunciated in 1819 by Chief Justice John Marshall in *M'Culloch* v. *Maryland*.[13] That case involved a discriminatory state tax specifically designed to hamper the operations of a United States agency, at a time when the local governments were more powerful taxing units than the Federal government. There is no doubt that Marshall's fears for the Federal government were justified when he penned the famous warning that "the power to tax involves the power to destroy."[14]

M'Culloch v. *Maryland* did not, however, lay down a rule banning all local taxation which might adversely affect the Federal government,[15] nor has it been interpreted that broadly by this Court in recent years. Various local taxes assessed against private corporations have been sustained even though their effect was to impose some economic burden on the Federal Government.[16]

The reason for Federal tax immunity was stated by Marshall when he declared the principle of immunity in *M'Culloch*:

---

[13] 4 Wheat. 316 (1819).

[14] *Id.* at 431.

[15] In fact, in speaking obiter of a contractor doing business with the Federal government, the Court said: "It is true, that the property of the contractor may be taxed, as the property of other citizens. . . ." *Id.* at 431.

[16] S.R.A., Inc. v. Minnesota, 327 U.S. 558 (1946) (tax levied subject to prior rights of government upheld on property where legal title in government but beneficial ownership in private corporation); Esso Standard Oil v. Evans, 345 U.S. 495 (1953); Alabama v. King & Boozer, 314 U.S. 1 (1941); James v. Dravo Contracting Co., 302 U.S. 134 (1937).

> "The only security against the abuse of [the taxing] power is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation." [17]

Marshall went on to say that since a tax levied on the Federal government is in reality a tax on all the citizens of the United States, no such tax may be levied by a state or local law-making body which does not represent all those citizens.[18]

But this reason does not apply in the instant case, for here there is an effective security against the abuse of the taxing power. The tax levied by the City of Detroit did not discriminate against the Federal government or against Murray. It applied with equal ad valorem force to all city property owners, who were represented in the city's law-making body and through it controlled the taxing power. Any "threat of destruction" to the Federal government would also be a threat of destruction to the hundreds of thousands of property owning voters of Detroit.[19]

III. The Application of the Rule of Federal Immunity in This Case Would Have the Effect of Requiring the People of Detroit to Pay Out of Their Own Pockets for Municipal Services Which Benefit All the People of the Nation.

The contract entered into by Murray in the instant case is sought to be used to avoid payment of the ad valorem

---

[17] M'Culloch v. Maryland, 4 Wheat. 316, 428 (1819).

[18] *Id.* at 428, 435.

[19] Of course, the general principle that people who pay taxes are entitled to have a voice in the election of those who pass the laws does not prevent taxing of the property of non-residents since they enjoy the benefits of local sovereignty and local protection of their property. M'Culloch v. Maryland, *supra* note 13, at 429; Thomas v. Gay, 169 U. S. 264, 276 (1898).

personal property tax of the City of Detroit. This attempt rests upon the placing in the Federal government of legal title to goods over which Murray exercised all the incidents of ownership.[20] Thus it is hoped to make Detroit's tax a tax directly on the Federal government rather than what it is, a tax against Murray involving property, the possession and beneficial ownership of which is enjoyed by Murray.

Like the many other Detroit taxpayers, Murray used the municipal services such as fire and police protection, street paving and sewage disposal, which this tax was designed to finance. These services increased, of course, as operations expanded with the government contract. To hold the property immune from Detroit's tax would be to force the other Detroit taxpayers to shoulder part of Murray's tax burden, while Murray continued to receive the tax benefit.

The Federal government, on the other hand, can command a cheaper price in its contractual negotiations if it is able to impart its tax immunity to its contractors. It can hardly be denied that the refusal of immunity in this case will increase the cost to the Federal taxpayer. But local taxpayers should not be expected to provide municipal services for government manufacturing operations out of their own pockets. "The cost of defense is a 'national' responsibility that should be extended over the complete tax base of the nation. The basic question would seem to be whether or not the cost of national defense should be borne by the whole nation on an equitable basis or whether particular communities because of their industrial abilities should be asked, indeed ordered, to bear more than their fair share."[21]

---

[20] See the discussion of these incidents of ownership in Appellants' Brief at pages 57-72.

[21] Deming, *Tax Free U. S. Industrial Property A Problem*, 43 NAT. MUN. REV. 95 (1954).

IV. The Holding of United States v. County of Allegheny Is Not Controlling Here, and Should Not Be Extended To Allow the Federal Government To Transfer Its Tax Immunity to Private Parties By Contract In This Manner.

United States v. *County of Allegheny*,[22] relied on by the Court of Appeals as controlling in the instant case, was decided at a time of great need on the part of the Federal government for maximum revenues to finance the war effort. It is distinguishable on that ground, and on those pointed out by Appellants' Brief.[23] Furthermore, its language indicating that a tax may not be levied on property where title is in the Federal government has been disregarded, or at least not so broadly interpreted by later decisions.[24]

The *Allegheny* case suggested that any change in the rule that localities may not tax property of the Federal government must await the voice of Congress.[25] It is submitted that without Congressional action that rule may be removed or at least confined to cases where the Federal government has full and actual ownership of the property and not merely paper title sought to be used to avoid paying for the support of local government. The doctrine of immunity was created by this Court through constitutional interpretation and it is within the province of this Court now to define its limits. It should not be applied where the reason for it does not apply.[26]

---

[22] 322 U. S. 174 (1944).

[23] Pages 23, 49, 50, 96 and 120.

[24] S.R.A., Inc. v. Minnesota, 327 U. S. 558 (1946); Esso Standard Oil v. Evans, 345 U. S. 495 (1953) (strained distinction that tax not on Federal government because measured by quantity, not value).

[25] *Supra* note 22, at 191.

[26] Mr. Justice Frankfurter has pointed out the error in a conceptual approach to the *M'Culloch* doctrine in Graves v. New York *ex rel.* O'Keefe, 306 U. S. 466, 487 (1939).

V. New Cases Should Be Decided in the Light of Present Conditions

A decision in any new case in this field of Federal tax immunity must be made against the background of the local and Federal tax situation as it exists today. Because of the tremendous growth of the Federal government, both in property ownership and tax revenues, the threat of destruction is no longer to the Federal government because of local taxing power, but to the local governments because of unwarranted restriction of their taxing power.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment affirmed below should be reversed and the complaint dismissed.

Respectfully submitted,

ROGER ARNEBERGH,
City Attorney,
Los Angeles, California.

PETER CAMPBELL BROWN,
Corporation Counsel,
New York, New York.

E. R. CHRISTENSEN,
City Attorney,
Salt Lake City, Utah.

J. ELLIOTT DRINARD,
City Attorney,
Richmond, Virginia.

MARSHALL F. HURLEY,
City Attorney,
St. Paul, Minnesota.

J. FRANK MCKENNA,
City Solicitor,
Pittsburgh, Pennsylvania.

JOHN C. MELANIPHY,
Corporation Counsel,
Chicago, Illinois.

CHARLES S. RHYNE,
S. WHITE RHYNE, JR.,
400 Hill Bldg., Wash., D. C.